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Wilson v. Ozmint 352 F.3d 847 (4th Cir. 2003)

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I. Facts

On September 26, 1988, James William Wilson ("Wilson") entered Oakland Elementary School in Greenwood, South Carolina and used a stolen .22-caliber nine-shot pistol to shoot and kill two eight-year-old elementary school children and wound nine other children and teachers.[1] Wilson pleaded "guilty but mentally ill" ("GBMI") to, inter alia, "two counts of murder . . . and one count of illegally carrying a firearm."[2] The trial court held a three-day hearing to determine if Wilson met the criteria for pleading GBMI.[3] After hearing twenty-four witnesses, the trial court concluded that Wilson met the statutory standard for pleading GBMI and allowed him to enter his plea.[4]

As required by South Carolina statute, the trial court offered Wilson's defense counsel, William Nicholson ("Nicholson") and David Belser ("Belser"), twenty-four hours to prepare for the sentencing proceeding.[5] Defense counsel refused, however, and the sentencing proceeding commenced that same afternoon.[6] After considering the mitigating and aggravating circumstances presented at the GBMI hearing, the trial court sentenced Wilson to death on May 9, 1989.[7]

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1. Wilson v. Ozmint, 352 F.3d 847, 853 (4th Cir. 2003); *see* State v. Wilson, 413 S.E.2d 19, 20–21 (S.C. 1992) (outlining the facts of the Oakland Elementary shooting); Mary Brooks, *Gunman Opens Fire in School: 1 Dead, 10 Wounded in South Carolina*, WASH. POST, Sept. 27, 1988, at A3, *at* 1988 WL 2027456. One child died the day of the shooting, and the other victim died three days later. *Second Child Dies As Result of School Shootings*, DALLAS MORN. NEWS, Sept. 30, 1988, at 12A, *at* 1988 WL 5323941. The Fourth Circuit issued its initial opinion on December 17, 2003, and subsequently amended part IV of its opinion in its order of February 17, 2004, denying Wilson a rehearing. *See infra* part III.C; Wilson v. Ozmint, No. 03-3, 2004 WL 292143, at *1 (4th Cir. Feb. 17, 2004) (denying a rehearing and amending part IV of the panel opinion of December 17, 2003).

2. *Wilson*, 352 F.3d at 853; *see* S.C. CODE ANN. § 17-24-20(A) (Law. Co-op. 2003) (requiring for a GBMI plea that the defendant show "because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law").

3. *Wilson*, 352 F.3d at 853–54; *see* S.C. CODE ANN. § 17-24-20(D) ("A court may not accept a plea of guilty but mentally ill unless, after a hearing, the court makes a finding upon the record that the defendant proved by a preponderance of the evidence that when he committed the crime he was mentally ill as provided in Section 17-24-20(A).").

4. *Wilson*, 352 F.3d at 854.

5. *Id.*; *see* S.C. CODE ANN. § 16-3-20(B) (Law. Co-op. 2003) ("The [sentencing] proceeding must be conducted by the trial judge before the trial jury as soon as practicable after the lapse of twenty-four hours unless waived by the defendant.").

6. *Wilson*, 352 F.3d at 854.

7. *Id.*

Wilson was denied relief by the Supreme Court of South Carolina on direct appeal and denied post-conviction relief ("PCR") in South Carolina state court.[8]

In June of 2002, Wilson filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina.[9] Although the magistrate judge recommended rejection of all Wilson's claims under 28 U.S.C. § 2254, the district court, without reviewing the case under § 2254, found eight constitutional errors in the state court proceedings and granted Wilson's petition for a writ of habeas corpus.[10] The State of South Carolina appealed to the United States Court of Appeals for the Fourth Circuit and Wilson cross-appealed.[11]

II. Holding

The Fourth Circuit held that the district court erred by not reviewing Wilson's habeas petition under the standards of 28 U.S.C. § 2254.[12] The court next applied § 2254 and found that the state court judgments were not "contrary to" and did not involve "an unreasonable application of" federal law.[13] The Fourth Circuit remanded to the district court with instructions to dismiss Wilson's petition.[14]

III. Analysis

A. District Court's Failure to Apply AEDPA

The court began its analysis by citing the district court's failure to review the state court determinations under the standards of 28 U.S.C. § 2254, part of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[15] The court found that the district court determination was "of little, if any, relevance to the proper disposition of Wilson's petition" due to its failure to apply the proper standard.[16] Under § 2254(d)(1), a writ of habeas corpus can only be granted if the state court determination "was contrary to, or involved an unreasonable application of, clearly established Federal law."[17] The court further noted that even if

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8. *Id.*; *see Wilson*, 413 S.E.2d at 29 (denying Wilson relief on direct appeal).

9. *Wilson*, 352 F.3d at 854.

10. *Id.* at 854–55; *see* 28 U.S.C. § 2254 (2000) (providing for the filing and review of federal habeas petitions; part of AEDPA).

11. *Wilson*, 352 F.3d at 854.

12. *Id.* at 855; *see* 28 U.S.C. § 2254 (discussing federal habeas corpus applications filed pursuant to state court decisions; part of AEDPA).

13. *Wilson*, 352 F.3d at 855, 872; 28 U.S.C. § 2254(d)(1).

14. *Wilson*, 350 F.3d at 872.

15. *Id.* at 854–55; *see* 28 U.S.C. § 2254 (stating the proper standard for granting a writ of habeas corpus; part of AEDPA).

16. *Wilson*, 352 F.3d at 855.

17. 28 U.S.C. § 2254(d)(1) (2000).

a writ of habeas corpus is granted, the petitioner must still show that, under *Brecht v Abrahamson*,[18] the constitutional errors " 'had substantial and injurious effect or influence on the verdict' rendered by the jury."[19] Next, citing *Williams v Taylor*[20] for the proper interpretation of § 2254, the Fourth Circuit proceeded to analyze the state court proceedings under AEDPA itself, rather than remanding to the district court.[21]

B. Mitigation Issues

The district court found that Wilson's trial counsel were ineffective for failing to notify him that one of the defense's expert witnesses had changed his opinion about Wilson's sanity at the time of the commission of the crime.[22] Dr. Donald Morgan ("Dr. Morgan") initially testified that Wilson was not insane at the time of the offense but later, after hearing others testify, changed his opinion and told Belser that he believed Wilson was insane at the time of the shootings.[23] The PCR court did not consider Dr. Morgan's reasons for changing his opinion convincing and also found Dr. "Morgan's testimony at the PCR hearing was tainted due to his personal opposition to Wilson's sentence of death, animus towards Dr. Dietz, the state's expert witness, and subsequent involvement with Wilson's defense team during the post-conviction proceedings."[24] The Fourth Circuit found that under § 2254(d)(2) and (e)(1), the state PCR court's factual determinations concerning Dr. Morgan's credibility were not "objectively unreasonable" and that Wilson failed to present "clear and convincing" evidence to the contrary.[25]

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18. 507 U.S. 619 (1993).

19. *Wilson*, 352 F.3d at 855 (alteration in original) (quoting Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)); *see* Brecht v. Abramson, 507 U.S. 619, 637 (1993) (providing that a writ of habeas corpus cannot issue without a showing of " 'substantial and injurious effect or influence in determining the jury's verdict' " because of the constitutional errors (quoting Katteakos v. United States, 328 U.S. 750, 776 (1946))). The court previously applied the "substantial and injurious effect" test in Fullwood v. Lee, 290 F.3d 663, 682 (4th Cir. 2002), a case decided after the passage of AEDPA. *Wilson*, 352 F.3d at 855. The court in *Fullwood* granted relief when the jury was shown to have considered extraneous material during deliberations. *Fullwood*, 290 F.3d at 682.

20. 529 U.S. 362 (2000).

21. *Wilson*, 352 F.3d at 855; *see* Williams v. Taylor, 529 U.S. 362, 406 (2000) (providing guidance for applying § 2254 when reviewing federal habeas petitions).

22. *Wilson*, 352 F.3d at 857.

23. *Id.*

24. *Id.* at 858.

25. *Id.*; *see* 28 U.S.C. § 2254(d)(2), (e)(1) (2000) (providing, when read together, for the grant of habeas relief upon clear and convincing evidence that the state court judgment relied on an erroneous factual determination; part of AEDPA).

The Fourth Circuit next found that the district court erred in granting habeas relief on two of Wilson's ineffective assistance of counsel claims.[26] First, Wilson argued that Nicholson and Belser should have presented additional mitigation evidence beyond that presented at the GBMI hearing.[27] The Fourth Circuit found that the state court's application of *Strickland v. Washington*,[28] the applicable federal law for determining ineffective assistance, was not "objectively unreasonable."[29] The court found that Wilson's trial counsel made a legitimate strategic choice not to present additional mitigating evidence at sentencing.[30] Further, the court noted that Nicholson and Belser had conducted a "substantial" investigation into Wilson's family history and possessed enough information to make a reasoned judgment whether to present additional evidence.[31] The court concluded that any additional witnesses would have been redundant and that the state PCR court properly denied Wilson relief on this issue.[32]

Wilson's second claim alleged that Nicholson and Belser were ineffective because they did not hire a social worker to compile a social history report.[33] Wilson specifically noted the significance of the holding in *Wiggins v. Smith*,[34] in which the United States Supreme Court concluded that a decision not to compile a social history report amounted to ineffective assistance of counsel.[35] The Fourth Circuit distinguished Nicholson and Belser's investigation from the limited investigation conducted in *Wiggins* by citing Nicholson and Belser's extensive research into Wilson's family and social history.[36] The court ruled that Nicholson and Belser's investigation allowed them to make a " 'reasonable professional judgment' " about whether to hire an outside researcher to expand

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26. *Wilson*, 352 F.3d at 860.

27. *Id.* at 861.

28. 466 U.S. 668 (1984).

29. *Wilson*, 352 F.3d at 861; Strickland v. Washington, 466 U.S. 668, 687 (1984) (establishing a two-pronged test for determining ineffective assistance of counsel); *see Williams*, 529 U.S. at 409 (stating that for a state court determination to be "an unreasonable application" of federal law, it must be objectively unreasonable).

30. *Wilson*, 352 F.3d at 862.

31. *Id.*

32. *Id.* at 862–63. Wilson also claimed that his counsel were ineffective for not presenting evidence in mitigation that medication caused his "stony-faced" appearance. *Id.* at 863. The court rejected this claim because Nicholson and Belser reasonably decided to present evidence that his "stony-faced" appearance was due to his mental illness rather than medication. *Id.* at 864.

33. *Id.* at 864.

34. 123 S. Ct. 2527 (2003).

35. *Wilson*, 352 F.3d at 864; *see* Wiggins v. Smith, 123 S. Ct. 2527, 2538 (2003) (finding that defense counsel's failure to compile social history reports violated prevailing professional norms and was thus ineffective assistance of counsel).

36. *Wilson*, 352 F.3d at 864.

on what they already knew.[37] The court distinguished between a situation in which counsel failed to investigate mitigating evidence, as in *Wiggins*, with a situation in which counsel investigated but did not use the fruits of the research, as in Wilson's case.[38] The court concluded that the state PCR court was not "objectively unreasonable" in finding Nicholson and Belser's investigation to be an adequate basis for a reasoned strategic decision.[39]

C. *The QCRB Report*

The Fourth Circuit addressed two issues concerning a report by the Quality Care Review Board ("QCRB"), which detailed Wilson's treatment in state-run mental health facilities.[40] On direct appeal to the Supreme Court of South Carolina, Wilson gained access to the report and made a motion for the court to defer consideration of the issue of its relevance to the defense so that defense counsel could review the report with its experts.[41] Subsequently, the Supreme Court of South Carolina ruled on all of Wilson's other claims and the issues concerning the QCRB report did not reappear until PCR proceedings.[42] The South Carolina PCR court ruled on substantive and procedural grounds that Wilson could not raise his claims because they were not exhausted on direct appeal.[43] In its opinion issued on December 17, 2003, the Fourth Circuit found that the PCR court was correct in refusing to hear Wilson's claims in PCR proceedings because the claims were either improper for failure to exhaust state court remedies or procedurally defaulted.[44] The court ruled that this failure "deprived the state courts of the 'opportunity to correct [the] constitutional violation' that he now alleges in federal court."[45]

On February 17, 2004, the Fourth Circuit issued an order denying Wilson a rehearing and amending its opinion of December 17.[46] The court's order changed the portion of its December 17 opinion concerning the QCRB report.[47] In his petition for rehearing, Wilson made two separate claims concerning the

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37. *Id.* at 865 (quoting *Strickland*, 466 U.S. at 690).

38. *Id.* at 864–65.

39. *Id.* at 865–66.

40. *Id.* at 866–67.

41. *Id.* at 866.

42. *Wilson*, 352 F.3d at 866–67.

43. *Id.* at 867; *see* Drayton v. Evatt, 430 S.E.2d 517, 519 (S.C. 1993) (holding that PCR courts cannot hear claims asserted for the first time that could have properly been raised at trial or on direct appeal).

44. *Wilson*, 352 F.3d at 867.

45. *Id.* (alteration in original) (quoting Rose v. Lundy, 455 U.S. 509, 518 (1982)).

46. *Wilson*, 2004 WL 292143, at *1.

47. *Id.* at *2.

report: (1) the trial court's in camera review of the QCRB report was improper; and (2) the PCR court improperly quashed his subpoena of the QCRB report.[48]

The Fourth Circuit first ruled that the in camera review of the trial court was proper "because Wilson's counsel invited the trial court's action."[49] In its December 17 opinion, the Fourth Circuit agreed with the state PCR court that Wilson's claim challenging the in camera review was improper for failure to exhaust state court remedies.[50] However, in its order issued February 17, the court ruled that this claim was not barred because of the "unusual circumstances" involved in Wilson's case.[51] The court noted that the Supreme Court of South Carolina granted Wilson's motion to defer ruling on the QCRB report until post-conviction proceedings.[52] The Fourth Circuit found that the grant of the motion removed Wilson's circumstances from those governed by the South Carolina rule barring claims not raised on direct appeal.[53] In this case, the Supreme Court of South Carolina explicitly allowed what the rule prevents.[54] The court ruled that Wilson became "an 'exceptional case in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question.' "[55] Instead, the court agreed with the PCR court's alternative procedural grounds, and held that Wilson was barred from raising the claim because his trial counsel invited the trial court's in camera consideration of the QCRB report.[56] The court found that " 'the failure to object to proceedings below waives the presentation of those issues on appeal' or 'in post-conviction absent an allegation of ineffective assistance of counsel.' "[57] The court found that this was "an adequate and independent basis" on which the state PCR court grounded its decision to reject Wilson's claim.[58]

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48. *Id.* at *3.

49. *Id.*

50. *Id.*; *see* Simmons v. State, 215 S.E.2d 883, 885 (S.C. 1975) ("Generally, post-conviction hearing statutes do not afford relief in the case of alleged errors for which remedies were available before and during the original trial . . . ." (internal citations omitted)).

51. *Wilson*, 2004 WL 292143, at *4.

52. *Id.* at *3.

53. *Id.*

54. *Id.* at *4.

55. *Id.* (quoting Lee v. Kemna, 534 U.S. 362, 376 (2002)).

56. *Id.*

57. *Wilson*, 2004 WL 292143, at *4 (alteration in original) (quoting Cummings v. State, 260 S.E.2d 187, 188 (S.C. 1979)); *see* State v. Robinson, 147 S.E. 441, 443 (S.C. 1929) ("Defendant's counsel is therefore in no position to complain as to matters . . . not only without objection on his part, but when solicited by him.").

58. *Wilson*, 2004 WL 292143, at *4. The court also concluded that this holding was unaffected by the Supreme Court of South Carolina's grant of Wilson's deferral motion because his agreement with the trial court's in camera review was before he made his motion for deferral. *Id.* at *4.

The court next addressed Wilson's contention that the PCR court improperly quashed his subpoena of the QCRB report.[59] Because the court ruled that Wilson's claim was not procedurally defaulted, the court reviewed the PCR court's quashing of Wilson's subpoena on the merits.[60] The Fourth Circuit found that the PCR court's decision to quash was not " 'contrary to' " federal law or " 'an unreasonable determination of the facts in light of the evidence presented.' "[61] The Fourth Circuit noted that the PCR court rejected Wilson's claim because the QCRB report "contained neither exculpatory nor mitigating evidence that was undisclosed in a different form."[62] The court concluded that this analysis was consistent with the applicable federal law to be applied under *Skipper v South Carolina*,[63] even though the state PCR court did not mention the holding in *Skipper* directly.[64] The court found that the PCR court's decision was neither "contrary to" federal law nor an "unreasonable determination of the facts" under applicable United States Supreme Court precedent.[65]

D. Procedural Default

The court next addressed the State's contention that the district court erred in granting relief to Wilson on his claim that he was not competent to enter a plea of guilty.[66] The State did not claim on appeal that Wilson procedurally defaulted his competency claim.[67] The court noted that Wilson's competency claim would have been procedurally barred had the State raised it as an issue, but because it failed to do so, the Fourth Circuit exercised its discretion and reviewed

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59. *Id.* at *5.

60. *Id.*

61. *Id.* (quoting 28 U.S.C. § 2254(d)).

62. *Id.*

63. 476 U.S. 1 (1986).

64. *Wilson*, 2004 WL 292143, at *5; *see* Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (holding that refusal to allow presentation of good behavior while incarcerated "deprived petitioner of his right to place before the sentencer relevant evidence in mitigation of punishment"); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (requiring that in capital cases " 'the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death' " (quoting Lockett v. Ohio, 438 U.S. 586, 605 (1978))). The Supreme Court has explicitly held that a lower court need not cite the applicable authority as long as the decision is not inconsistent with it. *See* Early v. Packer, 537 U.S. 3, 8 (2002) ("Avoiding [a violation of § 2254(d)(1)] does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them.").

65. *Wilson*, 2004 WL 292143, at *5–*6. The Fourth Circuit concluded that even if the PCR court's conclusion had been unreasonable, any error was harmless under *Brecht* and did not amount to a "substantial and injurious effect" on the ultimate decision whether to impose the death penalty. *Id.* at *6–*7 (citing *Brecht*, 507 U.S. at 637).

66. *Wilson*, 352 F.3d at 867–68.

67. *Id.* at 868.

Wilson's claim "on the merits."[68] The Fourth Circuit found that the trial court properly determined Wilson's competence to enter his plea and its decision was not "objectively unreasonable."[69]

E. Evolving Standards Under AEDPA

The only claim Wilson raised to the Fourth Circuit was that the death penalty "constituted 'cruel and unusual punishment' under the Eighth and Fourteenth Amendments" when inflicted on someone judged to be lacking " 'sufficient capacity to conform his conduct to the requirements of the law.' "[70] The court first cited *Lockyer v. Andrade*[71] for the proposition that the applicable federal law is the law that governed " 'at the time the state court reached its decision.' "[72] In 1992 the applicable United States Supreme Court precedent for determining an Eighth Amendment violation was *Penry v. Lynaugh*.[73] Under *Penry*'s two-pronged test a petitioner must show that either: (1) "the punishment was considered 'cruel and unusual' at the time that the Bill of Rights was adopted"; or (2) that " 'evolving standards of decency,' " as determined by " 'objective evidence,' " are violated by infliction of the punishment in question.[74]

Wilson conceded the first prong of the test but challenged the second prong because objective evidence proved that a national consensus against executing the mentally ill existed.[75] Wilson did not offer evidence from " 'the time the state

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68. *Id.* at 868. The court noted that it is within the discretion of the appeals court "whether 'to decide a petitioner's claim on the basis of procedural default despite the failure of the state to properly preserve the procedural default.' " *Id.* (quoting Yeatts v. Angelone, 166 F.3d 255, 261 (4th Cir. 1999)).

69. *Id.* at 869–70.

70. *Wilson*, 352 F.3d at 870 (quoting S.C. CODE ANN. § 17-24-20(A)); *see* U.S. CONST. amend. VIII (prohibiting the infliction of cruel and unusual punishment); U.S. CONST. amend. XIV (providing that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law"). It should be noted that this claim should be differentiated from a claim brought under Ford v. Wainwright, 477 U.S. 399, 410 (1986), which held that a state may not execute an insane or incompetent prisoner, and Atkins v. Virginia, 536 U.S. 304, 321 (2002), which held that it is a violation of the Eighth Amendment to execute the mentally retarded.

71. 538 U.S. 63 (2003).

72. *Wilson*, 352 F.3d at 870 (alteration in original) (quoting Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003)); *see* Lockyer v. Andrade, 538 U.S. 63, 71–72 (2003) (finding that " 'clearly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision").

73. *Wilson*, 352 F.3d at 870; *see* Penry v. Lynaugh, 492 U.S. 302, 330–31 (1989) (establishing two-pronged test for determining cruel and unusual punishment under the Eighth Amendment).

74. *Wilson*, 352 F.3d at 870 (alteration in original) (quoting *Penry*, 492 U.S. at 330–31). In *Atkins*, the United States Supreme Court applied the *Penry* test and found that a national consensus among the state legislatures, in conjunction with other factors, made the execution of the mentally retarded unconstitutional. *Atkins*, 536 U.S. at 321.

75. *Wilson*, 352 F.3d at 870–71.

court [rendered] its decision,' " but instead offered contemporary statistics to prove the existence of a national consensus.[76] The court noted unfavorably Wilson's use of contemporaneous statistics rather than evidence from 1992 but found that even Wilson's contemporaneous evidence did not show a national consensus.[77] After finding Wilson's evidence of a national consensus unpersuasive, the court ruled that the Supreme Court of South Carolina was not "objectively unreasonable" in finding the execution of someone unable to conform his conduct to the requirements of the law was not a violation of the Eighth Amendment.[78]

IV. Application in Virginia

A. Wiggins *Issue*

Wilson illustrates the contours of the *Wiggins* holding and how the Fourth Circuit intends to apply it. The court distinguished between cases like *Wiggins*, in which defense counsel predicated a strategic decision on virtually no investigation, and cases like *Wilson*, in which defense counsel conducted an adequate investigation and decided not to use the information gathered.[79] This outcome emphasized the fact that *Wiggins* does not make a failure to present all possible mitigating evidence ineffective assistance of counsel.[80] Instead, the *Wilson* court found that the investigation need only meet reasonable professional standards to justify strategic choices.[81]

B. Invitation of Trial Court Action

Defense counsel must be aware of all procedural mechanisms for denying claims on appeal no matter how obscure or seemingly technical. The Fourth Circuit barred Wilson's claim that the trial court's in camera review was improper because Wilson's trial counsel "invited the trial court's action."[82] Because of this invitation, the court ruled that Wilson could not make his claim on direct appeal

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76. *Id.* at 871 (alteration in original) (quoting *Lockyer*, 538 U.S. at 71–72).

77. *Id.* The court noted that, at best, Wilson's statistics showed that the various states were evenly divided over the issue of executing the mentally ill. *Id.* at 872.

78. *Id.*; *see* 28 U.S.C. § 2254(d)(1) (2000) (providing that federal habeas relief is not available unless a state court made a determination that was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; part of AEDPA); *Williams*, 509 U.S. at 409 (finding that federal habeas relief is available only if the state court determination was "objectively unreasonable").

79. *Wilson*, 352 F.3d at 864–65; *see Wiggins*, 123 S. Ct. at 2538 (finding that defense counsel's failure to compile social history reports amounted to ineffective assistance of counsel).

80. *Wilson*, 352 F.3d at 865 (citing Burger v. Kemp, 483 U.S. 776, 795 (1986)).

81. *Id.*

82. *Wilson*, 2004 WL 292143, at *3.

or in PCR proceedings.[83] This outcome is analogous to the Supreme Court of Virginia's recent decision in *Powell v Commonwealth*,[84] in which the court denied Powell relief on a claim that venirepersons should have been dismissed after being exposed to a prejudicial voir dire question posed by defense counsel.[85] The court ruled that because defense counsel posed the question, any error was invited and Powell could not raise an objection on appeal.[86] The court concluded that Powell should not benefit from his trial counsel's strategic choice.[87] Because the rule stated in *Powell* is similar to the rule in *Wilson* against appealing actions of the trial court invited by trial counsel, the Fourth Circuit will likely apply the same bar to federal review in similar Virginia cases.

C. *Avoiding Procedural Default*

Wilson provides another warning that defense counsel should be constantly aware of procedurally defaulting or failing to exhaust claims in state court. Wilson's competency claim was not procedurally defaulted per se because the State did not raise a procedural default claim in the federal habeas proceedings.[88] The Fourth Circuit noted the power it retained to recognize the default, but did not exercise that discretion in this case.[89] Instead, the court determined Wilson's claim on the merits and denied relief.[90] Defense counsel should not count on courts regularly exercising their discretion in this manner and should avoid procedurally defaulting any claims in state court.

D. *Irresistible Impulse*

Unlike South Carolina, Virginia does not allow a defendant to plead GBMI. Virginia does, however, have a limited irresistible impulse insanity defense. A claim of "irresistible impulse is solely a question of ability to control behavior known to be wrong."[91] The determination of irresistible impulse is focused on

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83. *Id.*

84. 590 S.E.2d 537 (Va. 2004).

85. *See* Powell v. Commonwealth, 590 S.E.2d 537, 559–60 (Va. 2004) (ruling that the cause of the potential jurors' grounds for dismissal was Powell's question and that the jurors were not required to be dismissed under the "invited error" doctrine). For a discussion and analysis of *Powell*, *see generally* Terrence T. Egland, Case Note, 16 CAP. DEF. J. 591 (2004) (analyzing Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004)).

86. *Powell*, 590 S.E.2d at 560.

87. *Id.*

88. *Wilson*, 352 F.3d at 868.

89. *Id.*

90. *Id.* at 870.

91. ROGER D. GROOT, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA 463 (West 2004). An irresistible impulse claim should be distinguished from a claim that the defendant could not differentiate between right and wrong, which is subject to Virginia's form of the *M'Naghten* test.

the mind of the defendant at the precise moment that the crime occurred.[92] In *Rollins v Commonwealth*,[93] the Supreme Court of Virginia held that if the act was planned in advance it was not a result of an irresistible impulse.[94] Also, an inability to conform one's conduct to the requirements of the law can be used as a mitigating factor at sentencing.[95] Virginia allows the execution of defendants like Wilson because death can be imposed even if the jury finds the inability-to-conform mitigator. Although technically different, the South Carolina and Virginia laws are virtually indistinguishable in actual result.

V. Conclusion

It is essential for defense counsel to understand the limits of the holding of *Wiggins* in the Fourth Circuit. *Wiggins* does not require the presentation of all possible mitigating evidence; *Wiggins* only requires an investigation adequate enough to be the basis of a strategic choice. *Wilson* also emphasizes the importance of remaining vigilant against the possibility of procedural default and failure to exhaust state court remedies. Valid claims may be lost for federal habeas review without proper attention being paid at the state court level. Finally, *Wilson* illustrates the technical distinction between South Carolina and Virginia in matters of mental competence, although the distinction is virtually meaningless in actual result.

Terrence T. Egland

Id. at 461–63; *see* Boswell v. Commonwealth, 61 Va. (20 Gratt.) 860, 868 (1871) (restating and adopting the test for insanity in *M'Naghten*); M'Naghten's Case, 8 Eng. Rep. 718 (H.L. 1843) (establishing the test for determining whether a defendant was insane at the time of the offense). As is required in Virginia, Wilson was first determined to be sane within the *M'Naghten* test before an analysis of whether he fit within the definition of mentally ill in section 17-24-20(A) of the South Carolina Code. *Wilson*, 352 F.3d at 857; *see* S.C. CODE ANN. § 17-24-20(A) (Law. Co-op. 2003) (requiring for GBMI plea that the defendant show "because of mental disease or defect he lacked sufficient capacity to conform his conduct to the requirements of the law").

92. GROOT, *supra* note 91, at 463–64; *see* Dejarnette v. Commonwealth, 75 Va. 867, 878 (1881) (providing a definition of irresistible impulse as "a sudden paroxysm of violence, venting itself in homicide . . . upon friend and foe indiscriminately").

93. 151 S.E.2d 622 (Va. 1966).

94. GROOT, *supra* note 91, at 464; *see* Rollins v. Commonwealth, 151 S.E.2d 622, 625 (Va. 1966) (holding that, as a matter of law, if the act was planned in advance it was not a result of irresistible impulse).

95. *See* VA. CODE ANN. § 19.2-264.4(B)(iv) (Michie Supp. 2003) (stating that "[f]acts in mitigation may include . . . at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired").

CASE NOTES:

Supreme Court of Virginia